Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78- 78-1097

ABRAHAM WEISKOPF and BERNICE WEISKOPF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming judgments of conviction under 18 U.S.C. §§ 152 and 371 and 26 U.S.C. § 7201 entered against them in the United States District Court for the Southern District of New York. As demonstrated below, it is respectfully submitted that certiorari is necessary in order to correct an error which strikes at the very heart of the immunity provision of the Bankuptcy Act.

Opinion Below

The opinion of the Court of Appeals is not reported and is reproduced as an Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was issued and entered on December 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

1. Whether petitioners' rights under the Fifth Amendment were violated by the impermissible indirect use of compelled, immunized testimony given by petitioners in proceedings under the Bankruptcy Act where: it is undisputed that the government's investigation originated from a criminal reference letter written by counsel to the Bankruptcy Trustee immediately after he had conducted an immunized examination of one of the petitioners on the subject matters referred for prosecution; the government sought to sustain its burden of negating taint under these circumstances by reliance upon the testimony of counsel to the Trustee that the immunized examination had no effect on his decision to make a criminal reference; and this after-the-fact testimony was contradicted by counsel's statement in the course of the immunized examination:

> Your Honor, I don't want to ask Your Honor to admonish the witness because if she wants to make speeches, they are going to be very interesting for the appropriate authorities. . . .

2. Whether the Trial Court committed prejudicial error by ruling that if petitioners called witnesses to testify as to their present reputation for honesty and integrity, those witnesses could be cross-examined about a 35 year old court-martial conviction of one of the petitioners where the Court had already ruled that the petitioner could not be cross-examined about that very same conviction because its prejudicial effect outweighed any possible probative value.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 11 U.S.C. § 25(a)(10), [Bankruptcy Act, § 7(a)(10)] provides that the bankrupt shall:

> [A]t the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge: *Provided, however,* That when the bankrupt is required to attend for examination, except at the first meeting and at the hearing upon objections, if

any, to his discharge, he shall be paid actual and necessary travelling expenses for any distance in excess of one hundred miles from his place of residence at the date of bankruptcy; *And provided further,* That the court may for cause shown, and upon such terms and conditions as the court may impose, permit the bankrupt to be examined at such place as the court may direct whether within or without the district in which the proceedings are pending. . . .

Rule 609(b) of the Federal Rules of Evidence provides:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Statement of the Case

Petitioners Abraham and Bernice Weiskopf were convicted by a jury of conspiracy to commit bankruptcy fraud; substantive violations of the bankruptcy fraud statute; and income tax fraud. Abraham Weiskopf was sentenced to one year in prison, a fine of $10,000, and a five year period of probation specially conditioned upon restitution of $282,000 to petitioners' corporations which are in proceedings under the Bankruptcy Act. Bernice Weiskopf was sentenced to one year in prison (of which three

months is to be served and the balance is to be on probation), a fine of $10,000, and a five year period of probation with the same special condition (A. 654-55).*

The United States Court of Appeals for the Second Circuit affirmed the judgments of conviction and remanded the case to the District Court solely with regard to the special condition of probation (App. 2-3).

To summarize the material facts briefly, petitioners were officers and shareholders of A.W. Fabrics, Inc. ("A.W.") and Maggie Fabrics, Inc. ("Maggie"), family owned corporations engaged in the business of buying, packaging and reselling fabric to retail stores. On May 8, 1975, Assignments for the Benefit of Creditors were filed by A.W. and Maggie pursuant to the law of the State of New York. Subsequently, the Assignments were converted into federal bankruptcy proceedings.

The assignee in the state proceedings and the trustee in the federal bankruptcy proceedings was the New York Creditmen's Adjustment Bureau. Counsel for the trustee was the firm of Hahn, Hessen, Margolis & Ryan, primarily in the person of the senior partner of that firm, Harry Margolis.

On October 20, 1975, Mr. Margolis called petitioner Bernice Weiskopf to testify in the Bankruptcy Court as an officer of the bankrupt companies (A. 280). That examination was conducted pursuant to the statutory grant of immunity contained in § 7(a)(10) of the Bankruptcy Act [11 U.S.C. § 25(a)(10)] and covered, among other things, both money and books and records missing from petitioners' corporations at the time of the bankruptcy—the very essence of the ensuing indictments on which petitioners were convicted.

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* References to (A. ——) are to pages in the Joint Appendix on appeal. References to pages in the Appendix to the instant petition shall be as follows: App. ——.

On the day immediately after he took the compelled and immunized testimony of Bernice Weiskopf, Mr. Margolis wrote a letter to the United States Attorney which expressed his view that petitioners had committed bankruptcy fraud in connection with the affairs of A.W. and Maggie (A. 272). That letter launched the criminal investigation which led to the indictments on which petitioners were tried (A. 40). Prior to that time, petitioners were not the subjects of any investigation by the U.S. Attorney or the F.B.I.

Reasons for Granting the Writ

1. When a defendant testifies under a statutory grant of immunity and is subsequently indicted, the government must satisfy a heavy two-part burden in order to sustain the indictment: it must negate any taint arising from direct or indirect use of the immunized testimony; and it must affirmatively show an independent, legitimate source for the evidence giving rise to the indictment. *Kastigar* v. *United States,* 406 U.S. 441, 460 (1972); *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 79 note 18 (1964).

The burden cannot be satisfied merely by showing that the prosecutor made no use of the immunized testimony. As the Second Circuit stated in *United States* v. *Nemes,* 555 F.2d 51, 55 (2d Cir. 1977):

> The inference that the prosecutor's lack of access to compelled testimony assures the existence of independent sources cannot be relied upon to afford the witness the full protection the Constitution guarantees. The prosecutor may have never seen the witness's testimony and may believe in good faith that no one associated with the federal prosecution has seen it, but such a disclaimer does not preclude the possibility that someone who has seen the compelled testimony

> was thereby led to evidence that was furnished to federal investigators.

Stated another way, the government must prove that the indictment would have occurred, and the evidence on which that indictment was based would have been developed by the prosecutor, even if the defendant had not given the immunized testimony. *United States* v. *Kurzer,* 534 F.2d 511 (2d Cir. 1976).

The manner in which this prosecution came about clearly focused the spotlight on Harry Margolis. He was the one who initiated the government's investigation, and he was the one who supplied the government investigators with their leads. To the degree that Mr. Margolis' criminal reference might have been directly or indirectly affected by his immunized examination of Bernice Weiskopf, this entire prosecution would be tainted and dismissal of the indictments required.

The government sought to satisfy its dual burden of negating the possibility of taint and establishing an independent source by calling Mr. Margolis at the hearing on petitioners' motion to suppress any evidence obtained from the immunized testimony. He described the investigation which his firm had undertaken in the New York State Assignment for Benefit of Creditors proceeding which antedated the filing of the bankruptcy petitions and stated that it was this investigation, along with Abraham Weiskopf's testimony in the Assignment proceeding, which led to his letter initiating this prosecution (A. 161-69).

Even though he had examined Bernice Weiskopf just one day before he wrote the reference letter, and even though that examination specifically dealt with the missing money and books and records, Mr. Margolis confidently asserted that his decision to initiate the prosecution was not influenced in any way by the testimony. He further

stated that he was able to block that testimony from his mind when he wrote the letter and only include information he had acquired prior to conducting the examination (A. 197). In addition, Mr. Margolis claimed that the immunized testimony could not have influenced his decision because it was not informative—it just "consisted of a lot of I don't know answers" (A. 176).

If the immunized testimony was of as little value as Margolis testified, and if he was so careful to segregate it into that portion of his mind which he claims to have insulated from the view of the F.B.I. agents and the U.S. Attorney, it is difficult to imagine why he would have made the following threat toward the conclusion of the testimony:

> Your Honor, I don't want to ask Your Honor to admonish the witness because if she wants to make speeches, they are going to be very interesting for the appropriate authorities. . . .

(A. 324). Who were the "appropriate authorities" who were going to be informed about the "speeches" contained in the immunized testimony? When asked what he meant by this remark, Margolis could only plead an inability to remember (A. 207). But the key is not what Margolis meant—it is what he did. And what he did tainted this prosecution.

Mr. Margolis was very careful to claim that the only information he communicated to the U.S. Attorney and the F.B.I. was information he obtained from his own pre-bankruptcy investigation, rather than from any tainted source (A. 173, 176). And the Court of Appeals placed great reliance on Mr. Margolis's professed ability to compartmentalize his mind in this fashion (App. 2). However, precisely what information Mr. Margolis gave to the government is only part of the inquiry. Equally important is the fact that he decided to communicate any information

at all—that he decided to write the October 21, 1975 letter which initiated this prosecution.*

In *United States* v. *McDaniel,* 482 F.2d 305 (8th Cir. 1973), the Eighth Circuit considered the uses of immunized testimony which would taint a prosecution. Although the most obvious would be direct presentation to the grand jury, the Court indicated that the proscribed "indirect" uses included the decision to initiate a prosecution:

> Such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution. . . .

(482 F.2d at 311).

In *McDaniel,* the prosecutor had read defendant's immunized state grand jury testimony, but argued that there was no taint because he had previously obtained the same information from F.B.I. reports. Thus, the argument was virtually identical to Margolis' claim that his decision to make a criminal reference derived from a source which antedated Bernice Weiskopf's immunized bankruptcy

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* The Court of Appeals deemed significant the fact that Mr. Margolis had no discretion regarding his criminal reference letter —that he was under a statutory duty to write the letter (App. 2). It is respectfully submitted that this is an oversimplification. The statute in question (18 U.S.C. § 3057) gave Mr. Margolis the discretion to make the determination whether there were "reasonable grounds for believing" a crime had been committed. A hindsight statement that such grounds existed prior to the immunized testimony cannot change the fact that Mr. Margolis apparently felt himself under no compulsion at that time, since he did not make the criminal reference until after the testimony. It is respectfully submitted that the Constitutional principle at stake is simply too important to permit the conclusion that the timing of the criminal reference was mere coincidence unrelated to the immunized testimony. The important thing is not what Mr. Margolis could have done or should have done—it is what he actually did.

testimony. In rejecting this argument, the Eighth Circuit stated:

> Because the trial court apparently failed to consider the immeasurable subjective effect of the prosecutor's reading of [defendant's] state grand jury testimony, we conclude that the court's finding that the government had fulfilled the burden of proof required by *Kastigar* [v. *United States*, 406 U.S. 441 (1972)] cannot stand.
>
> • • •
>
> [T]he United States Attorney is subject to human frailties. Thus, although he asserts that he did not use [defendant's] testimony in any form, we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case. We agree with Judge Metzner that "[i]t is difficult for the court to speculate as to the effect that the reading of the minutes might have had on the conduct and thinking processes of the [prosecutor]." *United States* v. *Dornau* . . . .

(482 F.2d at 312).

It is respectfully submitted if the words "Harry Margolis" are substituted for the words "the Prosecutor" and "the United States Attorney" in the above quotation, it becomes directly applicable to this case. The Second Circuit's attempt to distinguish *McDaniel* (App. 2) on the ground that the immunized testimony in that case had been reviewed by the prosecutor results in a failure to confront the principle for which *McDaniel* stands: that the normal operation of the human mind is such that a person who acts with knowledge of immunized testimony cannot negate the possibility that such testimony may have influenced his conduct. In other words, it is irrelevant whether the person exposed to the "forbidden fruit" is the prosecutor or the person who refers the matter to the prosecutor.

Moreover, even if the status of the person with access to the immunized testimony is deemed relevant, Margolis's role is closely analogous to that of the prosecutor in *McDaniel*. As counsel to the bankruptcy trustee, Mr. Margolis had a statutory duty to investigate criminal criminal conduct (18 U.S.C. § 3057) and had various legal obligations to the Bankruptcy Court and the creditors. In short, he was at the very least a quasi-public official.

However we view him, Mr. Margolis is not immune from the "human frailties" on which the Court in *McDaniel* based its decision. Yet, here, contrary to *McDaniel*, the District Court and the Court of Appeals failed to consider the "subjective effect" of the immunized testimony on Mr. Margolis. Rather, the Courts below relied on Mr. Margolis's testimony that he had decided to make the criminal reference before he examined Bernice Weiskopf on October 20, 1975 (A. 510). But in considering such testimony it is wrong to simply accept a witness's claimed ability to isolate and reconstruct his thought processes.

It is respectfully submitted that rather than this uncritical acceptance, the proper approach to testimony such as that of Mr. Margolis is that adopted in the opinion relied upon by the Eighth Circuit in *McDaniel: United States* v. *Dornau*, 359 F.Supp. 684 (S.D.N.Y. 1973), *rev'd on other grounds*, 491 F.2d 473 (2d Cir.), *cert. denied*, 419 U.S. 872 (1974). There, the Court dismissed an indictment on finding that the prosecutor had read defendant's immunized bankruptcy testimony, stating (359 F.Supp. at 687):

> It is difficult for the court to speculate as to the effect that the reading of the minutes might have had on the conduct and thinking processes of the Assistant charged with the prosecution of the case.
>
> It appears to me that once the subject matter was touched upon in the privileged testimony, and the prosecutor had read it, he could have used it in a

variety of ways in this criminal prosecution. The possibility of such use, and the impossibility of clearly showing that the use did not occur calls for the holding in this case that the defendants were denied the constitutional protection that their silence would have given them.

The government failed to suggest any acceptable reason for treating Mr. Margolis differently from the prosecutors in the cases discussed above. Indeed, since the prosecution originated with Mr. Margolis, and since all investigatory work prior to the immunized testimony was done by him, he must be treated as the functional equivalent of the prosecutor for purposes of determining whether the indictments were tainted. Any other approach would be completely unrealistic. And when viewed from this perspective, the decision of the Court of Appeals becomes impossible to reconcile with that of the Eighth Circuit in *McDaniel*. The Court here accepted precisely the kind of testimony which the Eighth Circuit held should not be accepted—testimony that Mr. Margolis was able to obliterate the immunized testimony from his mind at the time he made the criminal reference.*

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* Nor does Mr. Margolis's claim that the immunized testimony was uninformative (A. 176) justify the unquestioning credence which the Courts below gave to his assertion that it had no effect on his conduct. The testimony could well have influenced Margolis even if it did not tell him anything which he did not already know. In *United States* v. *Hinton*, 543 F.2d 1002 (2d Cir.), *cert. denied sub nom. Carter* v. *United States*, 429 U.S. 980 (1977), the government argued that even though the grand jury had admittedly considered defendant's immunized testimony, such consideration could not have contributed to the indictment because the testimony was purely exculpatory, consisting solely of defendant's denials of guilt. The Court rejected that argument, stating that the grand jury could well have inferred that defendant did not testify truthfully; and if that occurred, the immunized testimony would have contributed to the indictment.

(footnote continued on following page)

We are not in a position to say that the testimony definitely influenced Mr. Margolis. But there is nothing in the record from which the Courts below could conclude that it definitely did not. The only evidence is Mr. Margolis' denial. However, as the Eighth Circuit recognized, when a person who has had access to immunized testimony subsequently initiates a criminal prosecution, his denial that one thing had anything to do with the other is entitled to no weight because "human frailties" being what they are, "the testimony could not be wholly obliterated from [his] mind. . . ." *United States* v. *McDaniel, supra,* 482 F.2d at 312. But the District Court and the Court of Appeals based their decisions primarily on Mr. Margolis' testimony that the immunized testimony had no influence on him.

In order to resolve the conflict between the Second and Eighth Circuits, and to provide appropriate guidelines as to how bankruptcy trustees can fulfill their statutory obligations while at the same time preserving the Constitutional rights of persons whose testimony is compelled by statute, it is respectfully requested that this Court grant the petition.

(footnote continued from preceding page)

The identical reasoning applies here. There is little doubt that Margolis concluded that Bernice Weiskopf was not testifying truthfully and candidly on October 20, 1975. And his conclusion that she was lying could have been the straw that broke the camel's back. It could have been precisely what finalized his conclusion that there was no innocent explanation for the disappearance of the money and the books and records and precisely what finalized his decision to make a criminal reference—something that he had refrained from doing for several weeks prior to Mrs. Weiskopf's testimony. Indeed, neither Mr. Margolis nor the Courts which have examined his conduct provided any explanation for the gap between the time he had initially obtained incriminating evidence and the time he fulfilled his statutory duty by referring the matter for prosecution. The only event of any significance during this unexplained delay was the compelled immunized testimony of Bernice Weiskopf.

2. At the trial, the government indicated its intention to offer evidence that petitioner Abraham Weiskopf had been convicted on a theft charge at a court martial 35 years earlier while Mr. Weiskopf was serving in the United States Army. The Court ruled that if Mr. Weiskopf testified, the government could not elicit evidence of this conviction to impeach his testimony (A. 566). This ruling was entirely proper—and indeed required—pursuant to Rule 609(b) of the Federal Rules of Evidence, since the conviction was more than 10 years old and since its prejudicial value far outweighed its probative effect.

However, the Court made another ruling with regard to this conviction which constituted error. The Court ruled that if witnesses were called to testify as to Mr. Weiskopf's present reputation as a person of good character, it would permit the government to refer to the prior conviction in cross-examining those witnesses (A. 566). The patent abuse in these conflicting rulings was ignored by the Court of Appeals. While it did note that the trial court is possessed of wide discretion in this area (App. 3), it failed to deal with the inexplicable inconsistency in the District Court's ruling that would have allowed character witnesses to be cross-examined about a 35 year old conviction which could not have been used to impeach Mr. Weiskopf due to its highly prejudicial nature.

In ruling as they did, both the District Court and the Court of Appeals relied on *Michelson* v. *United States*, 335 U.S. 469 (1948) (A. 566) (App. 3). However, if consideration is given to the facts of *Michelson*, the error in these rulings becomes apparent. In *Michelson*, the defendant had been convicted of one crime 20 years prior to trial and had been arrested on another charge 27 years prior to trial. Defendant called five character witnesses, and the trial court permitted the prosecution to ask four of them on cross-examination whether they had heard of either the prior conviction or the prior arrest. In affirming, this Court made it clear that events so far in the past were inherently suspect and that reference to them was proper only because of the particular facts of *Michelson*. The Court stated (355 U.S. at 484):

> The inquiry here concerned an arrest twenty-seven years before the trial. Events a generation old are likely to be lived down and dropped from the present thought and talk of the community and to be absent from the knowledge of younger or more recent acquaintances. The court in its discretion may well exclude inquiry about rumors of an event so remote, unless recent misconduct revived them. But two of these witnesses dated their acquaintances with defendant as commencing thirty years before the trial. Defendant, on direct examination, voluntarily called attention to his conviction twenty years before. While the jury might conclude that a matter so old and indecisive as a 1920 arrest would shed little light on the present reputation and hence propensities of the defendant, we cannot say that, in the context of this evidence and in the absence of objection on this specific ground, its admission was an abuse of discretion.

Here, by contrast to *Michelson*, the Courts below did not limit the permissible use of the 35 year old conviction to character witnesses who had known petitioner for that, or a similar, length of time. On the contrary, they held that the testimony of any character witness—regardless of how long he or she had known petitioner and regardless of the fact that he or she would be testifying to petitioner's present reputation, rather than his reputation thirty-five years ago—would open the door to permit the prosecutor to refer to the conviction. *Michelson*, far from supporting this result, contradicts it, since the evidence in that case showed that at least some of the character witnesses were acquainted with the defendant at the time of

his prior arrest and conviction, that the defendant himself had called attention to his prior conviction, and that no objection had been made at trial. None of these factors was present here.

The approach which the District Court should have followed is suggested by Rule 609(b) of the Federal Rules of Evidence relating to the impeachment of a witness by a prior conviction. Rule 609(b) limits the use of convictions for impeachment purposes to those which are less than 10 years old unless the court finds some special circumstances supporting the probative value of an older conviction. Here, no such special circumstances existed, as evidenced by the District Court's ruling that the conviction could not be used for impeachment purposes if Mr. Weiskopf testified (A. 566)—a ruling which the Court of Appeals completely ignored (App. 3). And while Rule 609(b) does not expressly apply to cross-examination of character witnesses, there is no reason to treat the two situations differently.

Moreover, even if Rule 609(b) is not applied to cross-examination of character witnesses, the permissible scope of cross-examination of such witnesses would still be subject to Rule 403, excluding evidence the probative value of which is outweighed by its likely prejudicial effect. *Shimon* v. *United States,* 352 F.2d 449 (D.C. Cir. 1965); *Awkard* v. *United States,* 352 F.2d 641 (D.C. Cir. 1965). Here, the record is barren of any indication that the District Court engaged in the requisite balancing test, since the Court was of the view that *Michelson* v. *United States, supra,* provided authority for the automatic admission of the prior convictions. And the Court of Appeals, while finding that the prior conviction was relevant, completely ignored its prejudicial effect (App. 3).

If the Court had utilized the same scales as it did when considering the admissibility of this ancient conviction on cross-examination of Mr. Weiskopf, it could only

have found that the probative value of a conviction almost 35 years old was far outweighed by its likely prejudicial effect. While a trial court has discretion in this area, that discretion is not unlimited. The general rule is that the only character or reputation evidence which is proper is character or reputation at or around the time of the crime charged, or at a reasonable time before. Wigmore, *Evidence* (3d Ed. 1940) § 1617; McCormick, *Evidence* (1954 Ed.) § 158; *United States* v. *Lewis,* 482 F.2d 632, 641 (D.C. Cir. 1973); *Awkard* v. *United States,* 352 F.2d 641, 643-44 (D.C. Cir. 1965). And this rule should be applied whether the evidence at issue is defense evidence of good character or prosecution evidence of bad character. There is no justification for treating the two differently. In either instance, evidence relating to a period remote in time from the crime for which a defendant is on trial should not be permitted where it could serve to prejudice the jury.

And it is clear that appellants were prejudiced by this ruling. If character witnesses had testified, appellants would have been entitled to a jury instruction that character evidence alone could raise a reasonable doubt requiring a verdict of acquittal. *Michelson* v. *United States,* 335 U.S. 469 (1948); *United States* v. *Minieri,* 303 F.2d 550 (2d Cir.), *cert. denied,* 371 U.S. 847 (1962). Indeed, defendants requested such an instruction (A. 558), but withdrew that request when the Court's ruling compelled them to forego calling character witnesses. If the District Court had ruled properly on the prior conviction, the character witnesses would have testified and the instruction been given. It is respectfully requested that this Court grant the petition so that it may remedy the denial of due process of law which resulted from the rulings below, and provide guidance for District Courts which must regularly apply the Federal Rules of Evidence to determine the permissible scope of cross-examination of character witnesses.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: New York, New York
January 12, 1979

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of December, one thousand nine hundred and seventy-eight.

Present:

HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL
Circuit Judges

HON. JOHN F. DOOLING, JR.
United States District Judge
Sitting by Designation

78-1333

UNITED STATES OF AMERICA,
Appellee,

v.

ABRAHAM WEISKOPF and BERNICE WEISKOPF,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in all respects, except with respect to the special condition of probation, as to which we remand to the district court as provided hereinafter.

In ruling on defendants' motion to suppress evidence obtained from their immunized testimony, the District Court properly applied the standard set forth in *Kastigar* v. *United States,* 406 U.S. 441 (1972). The prosecution has the "heavy" burden of showing "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar supra* at 460. Based on the testimony of Margolis to the effect that he already had decided to refer the case to the U.S. Attorney when the immunized testimony was given, the District Court held that the prosecution had satisfied its burden.

Not only was Margolis acutely aware of the potential problems relating to the immunized testimony, but he took great pains to separate the evidence obtained through that testimony from the evidence that he had discovered through his own investigations. Prior to the testimony of Bernice Weiskopf, Margolis was aware that the money was missing and unaccounted for and that every record from which the disposition of funds could be ascertained also was missing. These clearly constitute "reasonable grounds for believing that any violations of the bankruptcy laws or other laws of the United States . . . has been committed." 18 U.S.C. § 3057(a).

Defendants' arguments that the decision in *United States* v. *McDaniel,* 482 F.2d 305 (8 Cir. 1973), and similar decisions, require suppression of the indictment because Margolis was in possession of tainted evidence when he referred the case to the prosecutor are not persuasive. Those cases involved situations in which the prosecutor himself read the immunized testimony and then conducted

the investigation that led to the defendant's conviction. Fear that the immunized testimony may have influenced the conduct of the investigation is not present here because only Margolis, the person in possession of the evidence, was the one who referred the case to the prosecutor; he did not conduct the investigation himself. As we indicated in *United States* v. *Catalano,* 491 F.2d 268 (2 Cir. 1974), there is no *per se* rule requiring dismissal of the indictment where *any* exposure to immunized testimony occurs.

The District Court's ruling with regard to the impeachment of defendant's character witnesses through the use of defendant's past conviction was correct. In ruling on character evidence, we have held that the District Court "has wide discretion and will be reversed only upon a clear showing of prejudiical abuse." *United States* v. *Morgan,* 555 F.2d 31, 33-34 (2 Cir. 1977) In holding that *Michelson* v. *United States,* 335 U.S. 469 (1948), permitted the introduction of a past conviction to test the extent of the characer witnesses' knowledge of defendant's reputation, the District Court hardly can be said to have abused its discretion. The incident about which inquiry would have been undertaken concerned the theft of goods, an incident which plainly relates to defendant's honesty and integrity and to the issue at trial. Moreover, there is nothing in *Michelson* which requires the exclusion of such an inquiry in situations such as this.

With regard to defendants' claim that the District Court's jury instructions resulted in a shifting of the burden of proof, a reading of the entire charge demonstrates that the court made it clear that the government bears the burden of proof on all issues. In each instance challenged by defendants, the District Court was merely commenting on a common sense inference that the jury might draw, but was not compelled to draw, from the evidence.

Similarly, the conspiracy charge sufficiently informed the jury that defendants had to be found to have agreed on

certain conduct designed to achieve a specific unlawful purpose. The District Court's failure to charge the language specifically requested by defendants does not constitute reversible error. The charge given by the court sufficiently informed the jury as to the illegal actions that must be found before defendants could be found guilty.

With regard to the special condition of probation imposed by the District Court pursuant to 18 U.S.C. § 3651, we remand to the District Court for a determination as to what the "actual damages" are. Since the jury never explicitly found that defendants owed $282,000 to the bankrupts, the decisions in *United States* v. *White*, 417 F.2d 89 (2 Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); *United States* v. *Taylor*, 305 F.2d 183 (4 Cir.), *cert. denied*, 371 U.S. 894 (1962); and *United States* v. *Stoehr*, 196 F.2d 276 (3 Cir.), *cert. denied*, 344 U.S. 826 (1952), appear to preclude the award on the present state of the record. Unless the parties on remand can stipulate to the correct amount, the District Court shall make this determination, after affording the parties an opportunity to be heard.

The judgment of conviction is affirmed. The case is remanded solely with respect to the special condition of probation.

William H. Timbers

WILLIAM H. TIMBERS
United States Circuit Judge

Thomas J. Meskill

THOMAS J. MESKILL
United States Circuit Judge

John F. Dooling, Jr.

JOHN F. DOOLING, JR.
United States District Judge
Sitting by Designation